No. 94-1133

Supreme Court, U.S.
FILED
JAN 30 1995
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In The

Supreme Court of the United States

October Term, 1994

PERCY DUPUIS,

Petitioner,

vs.

DON SNELL BUICK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Contrary to the issues stated by Dupuis in his Petition, the Fifth Circuit's opinion in this case is in no way inconsistent with the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993). Nor does this case turn on the question of a "pretext only" or "pretext-plus" interpretation of *St. Mary's*. Dupuis did not even create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination, much less produce evidence of discriminatory motive. Thus, by any standard and any interpretation of *St. Mary's*, Snell was entitled to summary judgment. The only appropriate question for review is:

> Whether the Fifth Circuit Court of Appeals erred in granting summary judgment in favor of Don Snell Buick, Inc. and holding that Plaintiff failed to introduce evidence sufficient to support a reasonable jury finding that Plaintiff was terminated because of his age?

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

A. Percy Dupuis, Petitioner

B. John E. Wall, Jr., Attorney for Petitioner

C. Don Snell Buick, Inc., Respondent

D. Jay C. Counts and Matt Holley, Littler, Mendelson, Fastiff & Tichy, Attorneys for Respondent.

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OPINIONS BELOW

Petitioner Percy Dupuis ("Dupuis" or "Petitioner") is a former employee of Respondent Don Snell Buick, Inc. ("Snell" or "Respondent"). Dupuis brought suit against Snell under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, alleging that he was terminated because of his age. The action was originally filed in state court, and removed by Snell to the United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3:93-CV-1220H. Thereafter, Snell moved for summary judgment.

By order dated January 31, 1994, United States District Judge Barefoot Sanders granted Snell's motion for summary judgment and dismissed Dupuis' claims. The district court found that: (1) Snell articulated a legitimate, nondiscriminatory reason for Dupuis' termination; (2) Dupuis failed to raise a genuine issue of material fact as to the truthfulness of Snell's articulated reason; and (3) Dupuis failed to raise a material issue of fact to support a finding that he was terminated because of his age (Pet. App. B).

On appeal to the Fifth Circuit Court of Appeals, No. 94-10200, Dupuis raised two issues: (1) whether the district court erred in holding that Snell satisfied its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination; and (2) whether the district court erred in holding that Dupuis failed to introduce evidence sufficient to support a finding that he was terminated because of his age. In affirming the decision of the district court, the Fifth Circuit held that Snell met its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination, and that Dupuis failed to produce evidence sufficient to support a finding that Snell's articulated reason was a pretext for unlawful age discrimination (Pet. App. A).

STATEMENT OF THE CASE

Snell is an automobile dealership that sells, leases and services automobiles. Dupuis was the service manager for Snell whose responsibilities included, among other things, supervision of service and repair work provided to customers and supervision of service department employees (Vol. 1, pp. 46, 51-52). Dupuis was terminated by Snell on February 3, 1993 as a result of his violation of company policies prohibiting being under the influence of alcohol at work and operating a company vehicle while under the influence of alcohol (Vol. 2, pp. 16, 55, 57, 82-83, 86). Dupuis' termination was not the result of a single incident, but was instead the culmination of Dupuis' repeated violations of Company policy regarding the use of alcohol over a period of many years. Dupuis' conduct continued despite repeated warnings and attempts by the Company to help Dupuis with his alcohol problem.

In July 1988, Don Snell, President of Snell, became suspicious that Dupuis was drinking on the job. Don Snell counselled Dupuis about drinking on the job and during lunch periods, as well as his concerns that Dupuis' drinking was a potential safety risk and could affect the service department's productivity. Don Snell provided Dupuis with specific instructions for the conduct of business that included an express prohibition against working under the influence of alcohol (Vol. 2, pp. 47, 50, 75, 105).

In May 1989, recognizing the seriousness of Dupuis' problem, Don Snell and his general manager, Jim Snell, met with Dupuis to discuss Dupuis' drinking problem as it affected his job performance and violated Company policy. During this meeting, Dupuis was given the option of seeking treatment for his drinking problem or being terminated from Snell's employment. Dupuis reluctantly agreed to seek treatment. Dupuis was told that any

repeated incident of drinking alcoholic beverages while at work or reporting to work under the influence of alcohol after the completion of his rehabilitation treatment would result in his immediate termination (Vol. 2, pp. 47-48, 52-53, 58, 76, 81).

Dupuis was hospitalized at Charter Hospital from May 10, 1989 to June 1989 for treatment of alcohol dependency. Dupuis' counselors recommended an extension of his treatment, which Dupuis declined (Vol. 2, pp. 20-24). Snell continued to pay Dupuis his full salary during his treatment at Charter Hospital (Vol. 2, p. 53).

Despite initial appearances that Dupuis had dealt effectively with his drinking problem, he had not done so. In October 1989, shortly after Dupuis' release from Charter Hospital, Dupuis was arrested and charged with felony retaliation against his wife (Vol. 2, p. 69). Dupuis' wife notified police that Dupuis was intoxicated and threatening her with violence (Vol. 2, p. 68). Mike McCarley, Snell's Body Shop Manager, went to the police station to obtain Dupuis' release from jail (Vol. 2, pp. 43-69).

In March 1991, Jim Snell again met with Dupuis upon suspicion that Dupuis was reporting to work under the influence of alcohol (Vol. 2, pp. 53, 59). Jim Snell was informed that Dupuis reported to work exhibiting slurred speech, tremors and bloodshot eyes. Jim Snell again reminded Dupuis that drinking during business hours was against Company policy and was grounds for immediate termination (Vol. 2, pp. 53, 59).

On January 31, 1992, Keith Black ("Black"), a District Service Manager for Buick Motor Division of General Motors Corporation and a frequent visitor to Snell Buick, informed Jim Snell that on January 27, 1992, Dupuis was abusive and appeared to be drunk. Black stated that this was not his first encounter with Dupuis in what appeared to be an intoxicated state, and he

preferred to deal with Raney Young, Dupuis' assistant, on his future visits (Vol. 2, pp. 15-16, 54). Jim Snell's investigation of the allegations revealed that many Company employees also witnessed Dupuis' intoxication on January 27th. The employees reported to Jim Snell that, on that date, (i) Dupuis' balance was so bad he had difficulty getting out of his car (the company car provided by Snell); (ii) Dupuis' eyes were bloodshot, his speech was slurred, and his attitude was belligerent; and (iii) Dupuis smelled strongly of alcohol. Dupuis was further observed going into his office, propping his feet on his desk, and falling asleep (Vol. 2, pp. 35, 38, 43, 54-55).[1]

A significant percentage of the work performed by Snell's service department (approximately 20%–30%) is warranty work. Since payment for such work can be received only from the Buick Motor Division upon the approval of its representative, it is critical that a professional and amicable relationship be maintained between Snell's service manager and the Buick Motor Division representative, in this instance, Keith Black. Black's inability to continue to work through Dupuis in administering the warranty work presented significant difficulties to Snell (Vol. 2, pp. 46, 52).

Don and Jim Snell met on Saturday, February 1, 1992, to determine the appropriate response to the overwhelming evidence of Dupuis' latest violations of Company policy. After considering the results of the investigation and Dupuis' history of violating the Company's policies relating to being under the influence of alcohol during working hours and while operating Company vehicles, Don and Jim Snell concluded that Dupuis'

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1. Snell's motion for summary judgment was supported by affidavits from numerous Snell employees stating that not only had they seen Dupuis intoxicated at work on many occasions but, more specifically, that Dupuis clearly appeared to be intoxicated at work on January 27, 1993.

continued violations of Company policy rendered him ineffective as a service manager and a considerable safety risk (Vol. 2, pp. 48, 55). Dupuis was terminated on February 3, 1992 (Vol. 2, pp. 55, 57, 86). As President of Snell, the final authority for the decision resided with Don Snell. Don Snell is thirteen (13) years older than Dupuis, and he has sworn that Dupuis' age was not a factor in the decision to terminate Dupuis' employment (Vol. 2, p. 49).

REASONS FOR DENYING THE WRIT

Summary

Dupuis seeks to invoke the extraordinary remedy of certiorari by arguing that the Fifth Circuit's opinion in this case is inconsistent with *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993), and by casting this as a significant case in a dispute among the circuits as to a "pretext only" or "pretext-plus" interpretation of *St. Mary's*. Neither is the case. Dupuis' position is based on the erroneous contention that he successfully established a material issue of fact as to the truthfulness of Snell's articulated reason, and the trial court thus granted summary judgment only because Dupuis could not go further and introduce additional direct evidence of discriminatory intent. That is simply not so. As the trial court and the Fifth Circuit properly held, Dupuis failed to create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination. Nor did Dupuis introduce evidence sufficient to support a finding that his age was a motivating factor in his termination. Thus, under any possible interpretation of *St. Mary's*, Snell is entitled to summary judgment.

In short, this case is not about "pretext only" versus "pretext-plus." This case is simply about whether Dupuis satisfied his burden under Fed. R. Civ. P. 56, as delineated by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548

(1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); and *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), of introducing evidence sufficient to support a reasonable jury finding that he was terminated because of his age. Dupuis failed to do so. Thus, the trial court properly granted summary judgment in favor of Snell.

I.

SNELL SATISFIED ITS BURDEN OF ARTICULATING A LEGITIMATE, NONDISCRIMINATORY REASON FOR DUPUIS' TERMINATION.

Dupuis argues that Snell did not meet its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination because there is a material fact issue as to the *credibility* of Snell's articulated reason. Dupuis' position is not only unsupported by the summary judgment record,[2] but it is legally flawed. The defendant's burden once the plaintiff has established a *prima facie* case of age discrimination is merely one of production. The employer need not prove the legitimate, nondiscriminatory reason; instead, the employer need only produce evidence "which, *taken* as *true*, would *permit* the conclusion that there was a legitimate, nondiscriminatory reason for its adverse action." *St. Mary's Honor Center*, 113 S. Ct. at 2748. The Court may not assess the credibility of the articulated reason, because the burden of production necessarily *precedes* the credibility assessment stage. *Id.*

In this case, there can be no question that Snell met its burden

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2. Dupuis attempts to create a "credibility" issue by arguing that Snell has given inconsistent reasons for Dupuis' termination. As discussed at pages 7-8, *infra*, however, there is simply no such inconsistency.

of articulating a legitimate, nondiscriminatory reason for Dupuis' termination. As set forth in the affidavits of Don Snell and Jim Snell, Dupuis was terminated because of his violation of Company policy prohibiting (1) reporting to work under the influence of alcohol; and (2) operating a Company vehicle under the influence of alcohol.[3] Dupuis' argument is meritless.

II.

DUPUIS FAILED TO CREATE A MATERIAL ISSUE OF FACT AS TO THE TRUTHFULNESS OF SNELL'S ARTICULATED REASON.

As explained by both the district court and the Fifth Circuit, Dupuis failed to produce evidence sufficient to support a reasonable jury finding that Snell's articulated reason for his termination was untrue. Dupuis attempted to establish pretext by arguing that there were inconsistencies in Snell's stated reason for termination. The alleged inconsistencies identified by Dupuis are as follows:

1. Dupuis stated in his affidavit that at the time of his termination, Jim Snell told him that he was being terminated because he was "unwilling to stop drinking" and "was having a loss of productivity." (Vol. 1, p. 97);

2. At a hearing before the Texas Employment Commission in connection with Dupuis' claim for unemployment compensation benefits, Jim Snell stated that Dupuis was terminated for being "intoxicated" on the job (Vol. 1, p. 98);

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3. The affidavits of Don Snell and Jim Snell are attached to the Petition for Writ of Certiorari as Appendices E and F, respectively.

3. In their affidavits supporting summary judgment, Jim Snell and Don Snell stated that Dupuis was terminated for violating Company policy prohibiting reporting to work under the influence of alcohol and operating a Company vehicle under the influence of alcohol (Vol 2, pp. 48-54).

As the district court recognized, Dupuis' attempt to characterize the above as inconsistent reasons for his termination is "meritless" and "an act of desperation." (Vol 1, p. 161).

It is obvious from even Dupuis' account of the facts, that Snell has consistently maintained that Dupuis was terminated because of his violation of Company policy regarding the use of alcohol. The question on summary judgment was whether a reasonable factfinder could conclude that the reasons were conflicting. *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("The reason given by [defendant] to [plaintiff] may indicate that the explanation was not complete, but a reasonable factfinder could not conclude that the reasons are conflicting or that they show the reasons articulated by [defendant] are unworthy of credence."). *See also Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (minor inconsistencies in an employer's explanation for terminating an employee do not raise a material fact issue). The trial court and the Fifth Circuit correctly found that a reasonable jury could not conclude that the reasons were conflicting.

Further, Dupuis' attempt to create a material issue of fact by submitting an affidavit denying that he was intoxicated on January 27, 1992 completely misses the mark. The mere existence of *some* disputed fact between the parties is insufficient to avoid summary judgment. Rather, the dispute must involve a *material* fact, *i.e.*, one which would support a reasonable jury finding in favor of the nonmovant. *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). The issue before the trial court was Snell's *motivation* for Dupuis' termination, not whether Dupuis was in fact intoxicated on January 27, 1992. *See Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991) ("the existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification"). *See also Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988) (the ADEA does not protect employees from erroneous or even arbitrary decisions, but only from decisions that are unlawfully motivated).

Dupuis did not dispute that he had been at work under the influence of alcohol on many occasions prior to January 27, 1992, and that Snell had counseled and warned him that this was grounds for immediate termination. Nor is it disputed that Don and Jim Snell received reports from Keith Black and many other Snell employees that Dupuis was under the influence of alcohol on January 27, 1992. Thus, Dupuis did not call into question Jim and Don Snell's *belief* that he was intoxicated on January 27, 1992, and that their decision to terminate him was motivated by that belief. Accordingly, the trial court properly granted summary judgment in favor of Snell.

III.

DUPUIS FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT HE WAS TERMINATED BECAUSE OF HIS AGE.

The ultimate burden of proving unlawful age discrimination rests at all times with the plaintiff. *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2747 (1993). Thus, in summary judgment proceedings, the ultimate question for the court is whether there is sufficient evidence in the record to permit a reasonable fact finder to conclude that the plaintiff was terminated because of his age. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 106 S. Ct. 1348, 1356 (1986). Dupuis produced no such evidence in this case.

The only "evidence" offered by Dupuis in an effort to show age bias were statements in his affidavit that (1) his replacement was paid less; and (2) he overheard an unidentified Snell employee say that Snell wanted to get someone younger to manage the service department (Vol. 1, pp. 97-98). Neither of these statements is sufficient to create a material issue of fact.

A. A mere salary discrepancy will not support a finding of unlawful age discrimination.

The mere fact of a salary discrepancy between Dupuis and his younger, less experienced replacement is insufficient to create a material issue of fact. A difference in salary simply does not equate to age discrimination, and Dupuis produced no evidence that salary considerations were even a factor in the decision to terminate his employment. Instead, in his affidavit, Dupuis simply stated in conclusory fashion that "[his replacement] was paid on a different pay scale that [sic] I was and

his percentage on his commissions were less." (Vol. 1., p. 98). As the district court correctly pointed out:

> The mere existence of the difference in salary is insufficient to raise a material issue of fact. Were the Court to hold otherwise, every frivolous or insubstantial claimant could defeat summary judgment by submitting his or her pay stub to the Court.

(Pet. App. B).

B. An alleged isolated remark by a non-decisionmaker is insufficient to create a material issue of fact.

Likewise, Dupuis' allegation that an unidentified Snell employee stated that the Company wanted to get someone younger for his position is insufficient to create a material issue of fact. Dupuis concedes that he cannot identify who made the alleged remark. More importantly, it is undisputed that the remark was not made by either Don or Jim Snell — the individuals who made the decision to terminate Dupuis' employment.[4] Dupuis' affidavit testimony on this issue is inadmissible hearsay which may not be considered by the court in summary judgment proceedings. *Martin v. John W. Stone*

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4. Dupuis stated in his affidavit that not only could he not identify who made the statement, but he could not even positively identify who was present during the conversation at which the remark was allegedly made. Instead, Dupuis merely stated that the following individuals were "possibly" present in the department at that time: Anthony Ashley, Johnny Kroseski, Carl Contreras, Jeff Hamlin, David Herring, Mike McCarley and Mike Taylor (Vol. 2, p. 91). Snell introduced affidavits from each of these individuals denying that they made any age-biased remarks (Vol. 2, pp. 13, 31, 33, 41, 44, 61). Even if Petitioner's allegation is accepted as true, however, it is insufficient to create a material issue of fact.

Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987); *Garside v. OSCO Drug, Inc.*, 895 F.2d 46, 50 (5th Cir. 1990). At any rate, even accepting Dupuis' statement as true, an isolated remark such as this by a non-decisionmaker is insufficient to create a material issue of fact to avoid summary judgment. *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Turner v. North America Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Guthrie v. Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992); *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990).

CONCLUSION

This is not, as Petitioner would have the Court believe, a significant case with respect to the issue of whether *St. Mary's Honor Center v. Hicks* requires a showing of "pretext only" or "pretext-plus." To the contrary, that question is not even necessary to the resolution of this case. By any standard, Dupuis did not satisfy his burden as a non-movant seeking to avoid summary judgment as established by the Supreme Court's *Celotex-Anderson-Matsushita* trilogy. Dupuis did not introduce evidence sufficient to create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination, much less evidence of discriminatory motive. Simply put, Dupuis failed to introduce evidence sufficient to support a reasonable jury finding that he was terminated because of his age. The district court properly granted summary judgment in favor of Snell.

Based on the foregoing arguments and authorities, Dupuis' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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